indicia. The question of who has control over these facilities is a critical issue because they are inputs to the provision of retail traffic. The incentive to exercise market power over these inputs will be affected by the extent to which carriers that control these facilities also have a large share of retail traffic on the route. Companies that control these inputs consider the effect on competition in the retail traffic market when pricing inputs. This relationship between carriers and control of key inputs creates the incentive to raise input prices (or otherwise degrade access) to other carriers in order to reduce competition in the retail market.

In addressing this concern under the competitive capacity expansion test, the Commission would require members of the "key applicant group" to demonstrate that they controlled "less than 50 percent of the existing wet link capacity on the route to be served by the proposed cable." *Notice* at ¶ 34. Ostensibly, the goal of this rule is to prevent the anticompetitive consequences that result from a linkage between control over key facilities of a cable and control of a high share of retail traffic on the route. However, the Commission's proposed rule fails to connect completely the relationship between share of retail traffic and control of key facilities. That is because the 50 percent test focuses on control of "existing wet link capacity." The focus on ownership of wet link capacity misses the importance of determining which carriers control retail traffic. In fact, a company that "owns" capacity and therefore potentially "controls" wet link capacity under the Commission's proposal, may not be the actual carrier that provides retail traffic and also may have very little actual "control" over that capacity. Thus, the rule as currently written raises at least two concerns.

First, it appears that the proposed rule does not contemplate business models other than the consortium cable model. Consider the case of a private cable operator that sells capacity to telecommunications carriers in the form of IRUs. IRUs give carriers a very long-term lease on a certain amount of capacity on a cable. Although IRU holders do not actually own the capacity, they are free to operate the capacity and price the services provided with the capacity in whatever way they desire over a long period of time. In doing a competitive analysis of retail traffic, the Commission should properly attribute such capacity to the IRU holder, not the underlying owner of the capacity. Failure to consider this circumstance would mean that all of the "existing wet link capacity" on a cable would be attributed to the operator, even though it actually delivers no traffic. This approach appears to undermine the Commission's intent to focus on the relationship between control over key inputs and control over retail traffic. Moreover, the Commission has previously recognized that taking into account IRU leaseholds more fully reflects control of existing capacity and results in a more accurate measure of market share.[8]

A second concern is that the proposed streamlining test focuses on all existing wet link capacity. Thus, dark capacity, which is not being used to deliver traffic, would be attributed to companies that operate or control the cable. Again, this formulation does not address the key question: whether formation of cables with key facilities controlled by carriers that also have a high share of retail traffic has anticompetitive consequences.

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[8] *See Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, at ¶¶ 86, 104 (1998); *Application re Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, 14 FCC Rcd 19140, at ¶ 48 (1999).

Control over dark fiber would not be relevant to making this determination. Instead the Commission should focus on active circuits.

To make the proposed competitive capacity expansion test clearly consistent with the competitive issue being addressed, the Commission should modify the proposed language laid out in paragraphs 33 and 34 of the *Notice*. In particular, the "50 percent test" should be modified to require applicants to demonstrate that entities in the key applicant group of a proposed cable control less than 50 percent of *active circuits* on the route to be served by the proposed cable. *Active circuits held under an IRU would be considered to be controlled by the IRU-holder.*[9] Use of active circuits would ensure that the Commission is focusing on the control over capacity that is actually being used to deliver traffic. The qualification for IRU-holders assures that control is being attributed properly.

In demonstrating whether the key applicant group is under the 50 percent threshold, the group would provide the Commission with the number of active circuits that it controls on the route today (accounting for IRUs). Applicants would also have to determine the total number of active circuits on the route, with the assistance of the Commission. A starting place for this determination would be the Commission's most recent Section 43.61 circuit report. 47 C.F.R. § 43.61. Although this report may not provide complete and timely information, it is a useful starting point. The applicants would then supplement this information with data they have regarding active circuits (for

[9] IRUs would be treated the same under Global Crossing's safe harbor proposal. Under this proposal, an application would be presumed to be in the public interest if the cable landing parties on the U.S. end of the proposed cable have a combined share of no more than 35 percent of the active half circuits, including half-circuits of full circuits, on the U.S. side of the route. *See supra*, page 11.

example, any active circuits controlled by the applicants must be part of the denominator, as well as the numerator). In addition, the Commission may wish to make use of data that has been filed by carriers but has not yet been released in a comprehensive report, and may also wish to conduct periodic industry roundtables to gather the most up-to-date information. In this manner, the Commission should collect the data that is practicably available and view the 50 percent test as general guideline, not as a talisman. It should be applied with flexibility to achieve sensible, pro-competitive results based on the Commission's best judgment using the available data.

C. Pro-Competitive Arrangements Test

The Commission seeks comment on a pro-competitive arrangements test. This test would assess whether a C&MA or other relevant documents governing a proposed submarine cable facility include certain pro-competitive arrangements regarding landing stations, backhaul, and capacity upgrades. *Notice* at ¶¶ 38-50. The *Notice*, at ¶ 39, states that such "pro-competitive arrangements should constrain the ability of major carriers on a cable to set supracompetitive prices by controlling backhaul and the timing of the final capacity upgrade of the cable system, which ultimately would result in higher prices for consumers."

Although specific conditions governing submarine cable facilities can curb anitcompetitive behavior, it is generally more effective and efficient to rely on structural competition to accomplish this objective. As described in section II.B. above, promoting facilities-based competition results in greater innovation and consumer benefits. Moreover, non-structural, behavioral conditions are difficult to police.

Therefore, in granting applications under a pro-competitive arrangements test, the Commission should specify in some detail what arrangements it expects the applicants to

provide to prevent anti-competitive behavior. For example, the Commission should adopt the specific option set forth in the *Notice* that would require the applicant to include the following provisions in its C&MA or other relevant documents: "(1) sufficient space at all landing stations in the United States, and at each foreign landing station on the route where applicants plan to land the proposed cable, will be made available to any other owner, or the designee of any other owner, for the purpose of collocating equipment to provide backhaul; (2) all owners or designees of owners may use such space for the provision by them of backhaul services to others; and (3) there will be no restrictions on the ability of any owner to subcontract the provision of backhaul." *Notice* at ¶ 42. These more specific conditions provide greater certainty and facilitate the enforcement of these arrangements compared to the more general alternative described in the *Notice*.[10]

In addition, applicants that are licensed under the pro-competitive arrangements should be prohibited from placing restrictions on the resale of the telecommunications services provided by their proposed cable. Moreover, this test should require provisions that prevent foreign dominant carriers from engaging in discriminatory behavior in the supply of operating agreements. Such operating agreements are used by many international carriers to terminate traffic carried on an undersea cable. In the past, dominant foreign carriers with interests in a consortium submarine cable have granted operating agreements *only* to carriers who use the consortium cable.[11] This creates a

[10] Under this general option, the applicant would include in the C&MA "general provisions allowing for sufficient collocation at a landing station by other owners or their designees and stating that there will be no restrictions on who can provide backhaul." *Notice* at ¶ 41.

[11] For example, in the *U.S.-Japan* proceeding, it was not disputed that U.S. carriers desiring a correspondent relationship were required by the applicants in that proceeding to be on applicants' proposed consortia cable. *See* Response of Global Crossing to

strong incentive for carriers to join the consortium cable, thereby deterring new entry and undermining competition in the international cable transport market. The Commission should consequently require the C&MA of such consortia cables to include a provision prohibiting the dominant foreign carrier owners of the cable from either denying operating agreements to carriers who use competing cables on the route or otherwise discriminating against these carriers in the supply of operating agreements.

The Commission should take steps to ensure that pro-competitive arrangements are enforceable. Global Crossing has no objection to private contractual enforcement, as proposed in the *Notice*, at ¶ 50. The Commission should, however, require the CM&A that covers the pro-competitive arrangements to include a provision that creates a private enforcement mechanism. In particular, this mechanism should give carriers the right to file an arbitration claim against a cable owner for failure to comply with the pro-competitive arrangements. This would promote effective implementation of these arrangements without burdening the Commission.

In addition, the Commission should also adopt reporting requirements that would permit the FCC and interested parties to monitor compliance with the pro-competitive arrangements. In particular, the owners of U.S. landing stations for cables licensed under the pro-competitive arrangement test should be required to submit semi-annual performance reports regarding their pricing for circuits on the cable, the provisioning times for services at their landing stations, and the number of backhaul providers,

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Supplemental Comments of Japan-U.S. Cable Network, Qwest Communications, Inc. and Viatel, Inc., at 11, File No. SCL-LIC-19981117-00025 (filed March 15, 1999).

including whether any backhaul provider has been refused space at a landing station. [12] This would enable the Commission and interested parties to track whether the landing station owners -- which generally are the dominant carriers on a consortium cable -- are engaged in discriminating against nondominant carriers in their pricing and provisioning practices.

V. THE COMMISSION SHOULD ADOPT PROCEDURES THAT EXPEDITE THE PROCESSING OF STREAMLINED APPLICATIONS.

The *Notice* seeks comment regarding the specific methods for streamlining the Commission's submarine cable licensing process. Global Crossing recommends that applications that fall within the safe harbor receive streamlined treatment similar to the Section 214 streamlined licensing process. Applications that fall in this category would be placed on public notice and automatically granted within a specified period of time unless the Commission informs the applicant during this period that it is not eligible for streamlined processing. As proposed in the *Notice* and as is the case with streamlined Section 214 applications, the Commission should not solicit comment from the public regarding cable landing license applications that fall within the safe harbor.[13]

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[12] The Commission has recognized the importance of performance reports as a tool to ensure continued compliance with Section 271's requirement that the Bell operating companies comply with various nondiscrimination provisions in order for them to offer inter LATA services. 47 U.S.C. § 271; *Application of Bell Atlantic New York for Section 271 Authorization*, 15 FCC Rcd 3953, at ¶¶429-32 (1999). In this context it is similarly important for the Commission to have a basis of comparison for how the landing party provides service to its retail competitors in relation to service to itself.

[13] In the context of Section 214 applications, the Commission has determined that "as a result of meaningful economic competition in international telecommunications, it is no longer necessary in the public interest to deny streamlined processing to an application that has been opposed." *1998 Biennial Regulatory Review - Review of International Common Carrier Regulations*, 14 FCC Rcd 4909, at ¶ 9 (1999). Global Crossing

Although the *Notice*, at ¶ 54, proposes that the streamlined public notice period be 60 days, the Commission should adopt at most a 30-day public notice period. A shorter period is more appropriate provided that the Commission adopts a safe harbor proposal, under which streamlined applications would not raise fact-intensive issues and would clearly not present anticompetitive concerns. Global Crossing urges the Commission to coordinate with the Department of State so that streamlined applications can be automatically granted on this 30-day schedule. Even if the Department of State requires additional time, however, the application could be granted on this schedule subject to the condition that the Department of State approves the application prior to construction.

The *Notice*, at ¶ 56, proposes to issue licenses under this streamlining process by public notice, rather than by issuing an order. Global Crossing fully agrees that no written order is required in granting a streamlined application. The Commission, should, however, issue a written license rather than simply rely on the issuance of a public notice. A written license not only appears to be required by the Cable Landing License Act,[14] it typically must be filed as part of the application process with other agencies, such as federal, state and local permitting authorities, in order to demonstrate that the applicant has in fact obtained FCC authorization to construct and operate the submarine cable in question. It would also appear easier to provide the ownership and other information the Commission proposes to disclose, *Notice* at ¶ 56, in a written license rather than in a public notice.

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believes the same policy should apply to the processing of submarine cable license applications that qualify for streamlined treatment.

[14] *See* 47 U.S.C. § 34 (requiring "written license" to land and operate submarine cable).

With respect to applications that do not fall within the safe harbor, the Commission should issue a public notice indicating that the application is ineligible for streamlined processing, and invite public comment on competitive or other issues raised by the application. The opportunity for public comment is critical for this category of applications given the fact-intensive issues they may raise. For example, they may present an issue of whether a particular route should be declared competitive. This not only would involve fact-intensive questions, but also would establish a precedent that would determine whether future applications on this route would receive streamlined processing under Global Crossing's "competitive route" safe harbor proposal. In these circumstances it is important to adopt procedures that ensure a complete administrative record.

On the basis of this record, the Commission should then issue a written decision regarding the application. These additional procedures for non-streamlined applications should not unduly delay their processing by the Commission. Indeed, many non-streamlined applications may present circumstances that result in an expeditious grant of a license. It is important, however, to distinguish between "safe harbor" applications that can routinely receive such treatment, and other applications that may require greater scrutiny.

VI. THE COMMISSION SHOULD ADOPT OTHER STREAMLINING MEASURES

Section IV of the *Notice* addresses "specific methods of streamlining" that were suggested by "[s]everal submarine cable licensees."[15] Global Crossing urges the

[15] *Notice* at ¶ 51.

Commission to take this opportunity to adopt additional streamlining measures, which are described below.

First, the Commission should reduce the level of ownership information required in applications for cable landing licenses. The Commission presently requires an applicant to disclose "[t]he name, address, citizenship and principal businesses of any person or entity that directly or indirectly owns at least ten percent of the applicant, and the percentage of equity owned by each of those entities (to the nearest one percent)."[16] This typically requires preparation of a lengthy exhibit that includes the required information for each ten percent or greater direct owner, and each ten percent or greater indirect owner, continuing up the chain of ownership. Global Crossing believes that the present ten-percent disclosure rule should, in the interests of streamlining, be relaxed to a twenty-percent threshold. Although this relaxation will reduce public awareness of minority ownerships in some cables, Global Crossing believes a twenty-percent threshold strikes the appropriate balance between an applicant's need to file in an efficient, streamlined manner and the public's need for disclosure of minority stakes.

Second, the Commission should eliminate its rule regarding disclosure of interlocking directorates, or, at a minimum, limit its application to common carrier cables. The present rule simply states that "[t]he applicant" shall "identify any interlocking directorates with a foreign carrier."[17]

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[16] 47 C.F.R. § 63.18(h). This rule applies to cable landing licenses because it is incorporated within 47 C.F.R. § 1.767(8), which states that applications for cable landing licenses should contain "for each proposed owner of the cable system, a certification as to whether the proposed owner is, or is affiliated with, a foreign carrier (as defined in § 63.09 of this chapter). Include the information and certifications required in § 63.18(h) through (k) of this chapter...."

[17] 47 C.F.R. § 63.18(h) (incorporated within 47 C.F.R. § 1.767(8)).

In its 1998 Biennial Review, the Commission repealed Part 62 of its Rules, which placed certain limitations and disclosure requirements on interlocking directorates of common carriers.[18] The Commission also decided to forbear from applying the Section 212 of of the Communications Act, which generally prohibited a person from serving as an officer or director of more than one common carrier.[19] The Commission, however, declined suggestions that it also repeal the interlocking directorate disclosure provision of Sections 63.18(h) and 1.767 of its Rules, concluding "without regard to the merit of these suggestions" that its review was confined to Part 62, and there was insufficient notice to repeal these sections as well.[20]

The Biennial Review basically found no circumstances under which limitations on, notice of, or reporting of interlocking directorates would serve any useful purpose. These conclusions apply with equal force to interlocking directorate disclosure requirements in cable landing license applications, and the Commission should take this opportunity to eliminate that requirement for all cable landing license applications. At a minimum, the Commission should clarify that this requirement does not apply to applicants seeking licenses as private carriers, given that the underlying interlocking directorate limitations in Section 212 of the Communications Act apply only to common carriers.

Third, the Commission should revise its rule requiring foreign carrier certification to make it less burdensome. The Commission presently requires an applicant to include

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[18] *See 1998 Biennial Regulatory Review – Repeal of Part 62 of the Commission's Rules*, CC Docket No. 98-195, Report and Order, 14 FCC Rcd 16530 (1999).

[19] *Id.*

[20] *Id.* at ¶ 18.

"[a] certification as to whether or not the applicant is, or is affiliated with, a foreign carrier. The certification shall state with specificity each foreign country in which the applicant is, or is affiliated with, a foreign carrier."[21] The Commission has consistently found that the only relevant foreign carrier affiliations are those in the countries where a cable lands.[22] As a result, a requirement that an applicant certify only foreign carrier affiliations in the destination countries of the cable would reduce burdens on carriers without reducing the ability of the Commission to implement its pro-competitive policies.

Fourth, the Commission should clarify what types of foreign carriers are subject to the rule requiring certification of foreign carrier affiliation. For purposes of cable landing licenses, the Commission defines "foreign carrier" as ". . . any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations . . . ."[23] Global Crossing believes that this definition is unnecessarily broad. A rule requiring an applicant to disclose only affiliations with carriers that have market power in the destination country would provide the Commission with the information it needs to safeguard against anti-competitive behavior.[24] As the Commission's landing license orders make clear, affiliations with

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[21] 47 C.F.R. § 63.18(i) (incorporated within 47 C.F.R.. § 1.767(8)).

[22] *See, e.g.*, *PAC Landing Corp.*, 14 FCC Rcd 3989, ¶ 12 (1999); *MAC Landing Corp*, 14 FCC Rcd 39812, ¶ 11 (1999); *SAC Landing Corp.*, 15 FCC Rcd 3039, ¶ 12 (2000).

[23] 47 C.F.R. § 63.09(d) (incorporated within 47 C.F.R. § 1.767(8)).

[24] For purposes of deciding which specific affiliations an applicant must disclose, the Commission could use its "List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets." The International Bureau issued this list in response to the 1998 Biennial Review in which the Commission modified its rules to remove its requirement that agreements between U.S.

foreign carriers on a destination route that do not control bottleneck facilities or have the ability to discriminate against U.S. carriers do not raise concerns under the Cable Landing License Act.[25] Accordingly, information on affiliations with such carriers is irrelevant to the Commission's consideration of landing license applications, and there is no reason to require applicants to include such information in landing license applications.

Fifth, the Commission should adopt relaxed procedures for *pro forma* assignments and transfers of control, just as it does under Section 214.[26] In March 1999, as part of its biennial regulatory review process, the Commission declined for the time-being to adopt such a proposal: "Although Section 10 of the Communications Act gives us authority to forbear from the requirements of the Communications Act, no party in this proceeding has argued that Section 10 gives the Commission the authority to forbear from the requirements of the Submarine Cable Landing License Act."[27] Global Crossing believes that the Commission's concern regarding Section 10 is misplaced. Although "the Submarine Cable Landing License Act requires that a cable landing license be

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telecommunications carriers and foreign carriers that lack market power in the foreign telecommunications market conform to the Commission's international settlements policy. *See 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148 and CC Docket No. 90-337, Report and Order and Order on Reconsideration, FCC 99-73 (rel. May 6, 1999). The list can be found on the Commission's web site at http://www.fcc.gov/Bureaus/International/Public_Notices/1999/da990809.txt.

[25] *See, e.g., PC Landing Corp.*, 13 FCC Rcd 23384, ¶ 12 (1998).

[26] *See* 47 C.F.R. § 63.24.

[27] *1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 (1999), *recon. pending*, ¶ 86.

obtained for any undersea cable directly or indirectly connecting the United States with any foreign country,"[28] this Act does not in any way address assignments or transfers of control. Rather, the power of licensees to assign or transfer control is governed entirely by the specific conditions on individual licenses. Since the Submarine Cable Landing License Act imposes no duties on the Commission with respect to *pro forma* assignments or transfers of control, the issue of statutory authority to forbear does not arise. The Commission has already indicated that it "agrees" in theory with the wisdom of adopting relaxed procedures for *pro forma* assignments and transfers of control of cable landing licenses.[29] Global Crossing therefore urges the Commission to reexamine its legal authority to adopt such procedures.

Sixth, the Commission should clarify the specific information that an applicant needs to include in its description of cable landing stations. The present rule requires an applicant to file

> A specific description of the cable landing stations on the shore of the United States and in foreign countries where the cable will land. The description shall include a map showing specific coordinates or street addresses of each landing station as well as the identity, citizenship, and specific ownership share of each owner of each U.S. landing station. The applicant initially may file a general geographic description of the landing points; however, grant of the application will be conditioned on the Commission's final approval of a more specific description of the landing points, including all information required by the paragraph. . . .[30]

By not enumerating the precise requirements of an adequate description, this rule fosters uncertainty among applicants attempting to comply with it. Some applicants include

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[28] *Id.*

[29] *Id.*

[30] 47 C.F.R. § 1.767(5).

extremely detailed information in their descriptions, while others include far less. To create a level playing field and to reduce unnecessary paperwork (both for applicants and for the Commission), the Commission should clarify exactly what it needs for landing station descriptions. The Commission should also clarify that, if a landing station has previously been authorized for another cable, a new applicant for that landing station does not need to provide any additional information in its description.

Seventh, the Commission should take this opportunity to codify its private cable policy and the ability of applicants to elect private cable status. For the past fifteen years, the Commission's policy on private cables has been governed by its *Tel-Optik Order*, which authorized the construction of "private" (non-common carrier) international submarine cables.[31] Although the *Tel-Optik Order* "expressed a general policy direction on private alternative submarine cable systems for the North Atlantic region,"[32] the Commission should codify its private cable policy, and allow applicants to "elect" private carrier status rather than putting applicants to their proof on this issue.

Under Section 1.767(a)(6) of the Commission's Rules, an applicant for a cable landing license is required to include a statement in its application as to whether the cable will be operated on a common carrier on non-common carrier basis. However, unlike other services governed by the Commission's rules, the applicant's request for private

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[31] *See Tel-Optik Limited, Application for a License to Land and Operate in The United States a Submarine Cable Extending Between the United States and the United Kingdom*, File Nos. 1-SCL-84-002, 1-SCL-84-003, *Submarine Lightwave Cable Company, Application for a License to Land and Operate in the United States a High Capacity Fiber Optic Digital Submarine Cable Extending between the United States and other North American Countries, on the Other Hand*, Memorandum Opinion and Order, 100 FCC 2d 1033 (1985) ("*Tel-Optik Order*").

[32] *Petition* ¶ 10; *see also id.* at ¶ 63.

carrier status in the submarine cable context is not treated as a simple election.[33] Rather, under the Commission's private cable policy, orders granting cable landing licenses evaluate an applicant's request for non-common carrier status under the two-prong test of *National Association of Regulatory Utility Commissioners v. FCC*.[34] Thus, even though the Commission has never actually denied an applicant's request for private carriage status,[35] as a practical matter, applicants making such a request bear the burden of proof and routinely brief their entitlement to private carriage status under *NARUC* in their landing license applications.

Global Crossing urges the Commission to allow applicants to make an election of private carriage status (as other Commission applicants are entitled to do), thereby eliminating the need to demonstrate that they are entitled to such status. The Commission should also adopt a rebuttable presumption that would grant such elections as a matter of course in applications eligible for streamlined processing. First, if the applicant includes a statement or certification in its application to the effect that capacity will be offered on a private carriage basis, nothing else should be required of the applicant, and no further analysis should be required by the Commission to meet the first prong of *NARUC*. Second, if an application is eligible for streamlined processing (*i.e.*,

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[33] *See, e.g.*, FCC Form 312 (Application for Satellite Earth Station Authorization); FCC Form 601 (Application for wireless radio services, including public mobile services, personal communications services, general wireless communications services, and fixed microwave services).

[34] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC*"). Under the two prong test established by *NARUC*, the Commission will authorize private carriage where (i) there is no public interest reason to require common carriage and (ii) there is no reason to expect that capacity would be held out to the public indifferently.

[35] *Notice* at ¶ 69.

there are no competitive or other public interest reasons to require close scrutiny), then presumptively there should be no public interest reason to reject an applicant's request to operate on a private carrier basis.

Adopting such a presumption would save both applicant and Commission resources. Applicants would no longer need to brief their entitlement to private carriage status in landing license applications, and the Commission's staff would no longer need to include a boilerplate *NARUC* analysis of those requests in cable landing licenses. At the same time, the Commission, as it does today, may always reserve the right to impose common carrier regulation at a later time if circumstances should warrant such action.

VII. THE COMMISSION SHOULD CODIFY THE ROUTINE CONDITIONS IMPOSED ON CABLE LANDING LICENSES AND DEVELOP SPECIAL CONDITIONS FOR LICENSES INVOLVING "MAJOR SUPPLIERS"

The *Notice* seeks comment on two proposals made by Level 3 regarding conditions routinely imposed on cable landing licenses. First, Level 3 has urged the Commission to codify routine conditions within a rule, as is currently done with Section 214 authorizations.[36] Such codification would, Level 3 suggested, enable the Commission to eliminate the requirement that the applicant notify the Commission within 30 days of grant of the application that it accepts the terms of the license.[37] Second, Level 3 urged the Commission to adopt special conditions for the licenses of submarine cables whose participants include carriers that are "major suppliers." These conditions, which are summarized in paragraph 76 of the *Notice*, are designed to prevent such carriers from acting anticompetitively in the submarine cable market.

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[36] *See* Level 3 Comments at 12-13; *Notice* at ¶ 74.

[37] *See* Level 3 Comments at 13; *Notice* at ¶ 74.

Global Crossing supports both of Level 3's proposals. By codifying routine conditions and eliminating the 30-day notification requirement, the Commission would significantly reduce the confusion and transaction costs now associated with obtaining a cable landing license. These reductions would help make the submarine cable market more competitive. By also imposing special pro-competitive conditions on licenses involving "major suppliers," the Commission would further enhance competitiveness within the submarine cable market.

One uncertainty arising out of Level 3's second proposal is how best to define "major supplier." As described in the *Notice* at ¶ 75, Level 3 would adopt the definition used in the Reference Paper to the WTO Basic Telecom Agreement: "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market."[38] Global Crossing supports the use of this definition as a general category and as a means of ensuring consistency in the FCC's implementation of the WTO Basic Telecom Agreement. But it would be useful to craft a more specific definition to clarify the Commission's intent. Specifically, the Commission could impose special conditions on those licenses covered by the Pro-competitive Arrangements Test proposed by the Commission, and described in section III.C of the *Notice*. Entities implicated by this test will typically be dominant carriers that have major interests in a consortium cable.

Whatever definition the Commission adopts for "major supplier," it should ensure that new entrants and non-dominant carriers need not comply with the special conditions

[38] *See* Level 3 Comments, n. 1, *citing* Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), 36 I.L.M. 354, 367 (1997).

proposed by Level 3. Since these entities do not pose an anti-competitive threat, requiring their compliance with special conditions simply would not make sense, and would in fact lessen their ability to compete by saddling them with supererogatory burdens.

VIII. THE COMMISSION SHOULD ADOPT THE METHOD PROPOSED IN THE *NOTICE* FOR DETERMINING WHO SHOULD BE INCLUDED AS AN APPLICANT FOR A CABLE LANDING LICENSE

The *Notice* seeks comment on who should be required to be included as an applicant for a cable landing license. Global Crossing has previously indicated that the owners of landing stations are the most important parties that should be treated as licensees.[39] Global Crossing also noted, however, that a license can play the important role of allowing the public to obtain "key market information that is relevant to judging the nature of concentration of market power."[40]

In paragraph 81 of the *Notice*, the Commission proposed a specific method for determining who should be included as an applicant for a cable landing license. Global Crossing believes that this proposed method does a good job of representing both of its above-described priorities regarding cable landing licenses. Global Crossing therefore urges the Commission to adopt the method set forth in paragraph 81 of the *Notice*.

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[39] *See Notice* at ¶ 80 (citing Global Crossing Statement in *Forum Transcript* at 25-26).

[40] *Id.*

IX. IN A FUTURE PROCEEDING, THE COMMISSION SHOULD PROPOSE, PURSUANT TO SECTION 9(B)(3), APPROPRIATE MODIFICATIONS OF REGULATORY FEES

In the *Notice*, the Commission addressed two proposals made by Level 3 regarding licensing and regulatory fees. First, Level 3 urged the Commission waive or forbear from applying licensing and regulatory fees on all submarine cable license applications. The Commission declined to include this proposal in the *Notice* because it could not be supported by "[t]he applicable statutory provision" of the Communications Act.[41] In addition, Level 3 urged the Commission to modify the fee structure as it applies to international bearer circuits on submarine cables. Although it also declined to include this proposal in the *Notice*, the Commission solicited "comment generally on whether, if we ultimately adopt the streamlining measures proposed in this NPRM, it would be in the public interest to propose, pursuant to Section 9(b)(3), a modification of the regulatory fees."[42]

Global Crossing believes that, should the Commission adopt streamlining measures, the public interest would indeed be served by appropriate modifications of regulatory fees. In particular, Global Crossing supports Level 3's argument that the fee structure for international bearer circuits on submarine cables would no longer make sense under a streamlined regulatory regime. As Level 3 noted, the annual fee of $7.00

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[41] *Notice* at ¶ 91.

[42] *Id.* at ¶ 94. Section 9(b)(3) authorizes the Commission to enact "Permitted Amendments": "[I]n addition to the adjustments required by paragraph (2), the Commission shall, by regulation, amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment . . . . In making such amendments, the Commission shall add, delete, or reclassify service in the Schedule to reflect the additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law . . . ." 47 U.S.C. § 159(b)(3)."

per 64 KB active circuit on submarine cables is excessive, placing a disproportionate burden on the owners of submarine cables and failing to "capture contributions from any of the hundreds of international resellers that benefit from the international activities of the Commission."[43] As Level 3 also noted, fees that are based on a 64 KB circuit model are increasingly unfair "in today's world of high capacity submarine cables," since this model often "result[s] in a disproportionate amount of fees being assessed on owners of large amounts of bandwidth, such as private cable system owners, regardless of the types of services they provide."[44]

Global Crossing believes that it would be in the public interest for the Commission to create a fairer and more pro-competitive fee structure for international bearer circuits on submarine cables – a structure that places a proportionate burden on all relevant participants and not just on certain owners. Global Crossing therefore urges the Commission to propose, at an appropriate future date, a suitable modification of the regulatory fees pursuant to Section 9(b)(3).

X. THE ACTIVITIES OF OTHER LOCAL, STATE, AND FEDERAL AGENCIES IMPOSE SIGNIFICANT DELAYS AND COSTS ON SUBMARINE CABLE OPERATORS

In his dissent to the *Notice*, Commissioner Furchtgott-Roth acknowledges that "many of the delays and costs imposed on undersea cable ventures may stem from the actions of other governmental entities," and invites comment on "any governmental barriers to entry and what steps the Commission may take under Section 253 [of the

[43] Level 3 Comments at 16.

[44] *Id.*

Communications Act, 47 U.S.C. § 253] to preempt such barriers."[45] Global Crossing agrees that delays and increased costs stemming from government activities at the state, local and even federal levels are issues of critical importance to the undersea cable industry and welcomes the opportunity to advise the Commission on its experiences in this area.

To land its cable systems, Global Crossing's project companies must obtain, in addition to an FCC cable landing license, multiple permits and licenses, as well as various types of rights-of-way agreements or franchises, at the federal, state and local level. While the particular permitting or franchise requirements may differ from jurisdiction to jurisdiction, or from agency to agency, it has been Global Crossing's experience that a single U.S. cable system with two landings often involves review and some form of approval by as many as *25 different governmental resource and land use agencies, taking over two years to complete.*

Global Crossing recognizes the importance and significance of the land use and environmental issues within the jurisdiction of these federal, state, and local agencies, and has been an industry leader in working cooperatively with these agencies and interested parties to ensure the early examination and resolution of any impact issues. However, from its experience in gaining approval of 5 cable systems having 11 segments and 5 U.S. landing sites, Global Crossing has experienced first-hand the increased costs

[45] Dissenting statement of Commissioner Harold Furchtgott-Roth at 3. Section 253, among other things, outlaws, and permits FCC preemption of, state and local laws, regulations and requirements that prohibit or have the effect of prohibiting the provision of telecommunications services. *See* 47 U.S.C. § 253(a), (d). The provision also places limits on management of rights of way by state and local governments and the imposition of associated fees. *See* 47 U.S.C. § 253(c).

and delays in deployment resulting from these regulatory activities.[46] A related issue is the failure of resource and land use agencies to consider, either in the speed of their review or the substantive factors that they balance, the important federal policies associated with the rapid deployment of secure, international telecommunications facilities, and the policy considerations underlying the FCC's authorization to land and operate a submarine cable in the United States.[47]

Given these issues, Global Crossing recommends that the Commission commence a proceeding to examine its coordination with state, local and federal resource agencies that are responsible for permitting submarine cable systems. The Commission should

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[46] Both the length of time that particular agencies take to process these applications, combined with the refusal of agencies in many instances to process permits in parallel rather than seriatim -- *i.e.*, one agency refusing to act prior to grant by another agency -- adds substantial delays and costs. A further source of cost and delay is that under certain circumstances, a permitting authority will conduct its own independent, *de novo* review and analysis, revisiting issues that have already been considered and passed on by another permitting agency.

[47] *See* Cable Landing License, *In the Matter of AT&T Corp., Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan,* 14 FCC Rcd 13066, ¶ 25 (1999) (public interest is best served by promoting the rapid expansion of capacity in order to promote facilities-based competition that will result in innovation and lower prices to consumers of international telecommunications services); *see also* Notice of Inquiry, *Matter of Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* 13 FCC Rcd 15280, ¶ 35 (1998) (international submarine cables are vital to satisfying both current and anticipated demand for international telecommunications capacity). Moreover, as reflected in a Presidential directive, international telecommunications facilities are a key part of the nation's "critical infrastructure" that must be protected against natural disasters and intentional attack. *See* Executive Order No. 13010 (July 15, 1996)(recognizing that telecommunications infrastructure is "so vital that [its] incapacity or destruction would have a debilitating impact on the defense or economic security of the United States."). The President has thus implemented a coordinated, federal state and industry effort to protect telecommunications facilities and systems. *See* Presidential Decision Directive No. 63 (May 1998). In their permitting decisions, state and local authorities should also balance this important federal policy, and ensure that their decisions do not serve to undermine the physical integrity of subsea systems.

also ask its Local and State Government Advisory Committee to address these issues critical to the timely deployment of telecommunications facilities and make recommendations to the Commission for appropriate action at the federal level.

As noted by Commissioner Furtchgott-Roth, the incredible cost associated with securing the requisite rights-of-way to cross state-submerged lands and other public property is also a significant concern for the undersea cable industry. As Global Crossing previously stated in comments filed pursuant to the Commission's proceeding in the *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, the Company has experienced regulatory overreaching by state and local governments in contravention of Section 253 as they continue to extract exorbitant fees in exchange for access to public rights-of-way.[48] State agencies controlling submerged lands often now impose fees that have no relation to historic measures, and that are orders of magnitude higher than what had been charged for prior cable crossings. In many cases, rights-of-way fees are also completely unrelated to the costs associated with the public entity's management of the rights-of-way, and are set unilaterally by the state or local governmental entity with little or no limiting standards or accountability in place.[49] At bottom, while dealings with state and local

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[48] *See* Global Crossing Comments filed October 12, 1999, and reply comments filed December 13, 1999.

[49] Even once the fees are established, state and local entities have been increasingly requiring other fee-related terms as part of a right-of-way agreement that are commercially unreasonable and would never be included in an arms-length commercial transaction. One such term is a "re-opener" provision which allows the governmental body to revisit the fee at some future date and increase the fee at its sole discretion, creating a significant degree of uncertainty as to deployment costs and complicating business planning. Provisions are also often included that strip the ability of the carrier to challenge the lawfulness of the fee, including provisions waiving administrative and judicial review of fee provisions or invalidating the entire agreement if the fee is voided.

governmental bodies have the trappings of a negotiation, in essence, cable operators are forced to accept the compensation demanded and other terms and conditions imposed in order to timely deploy their systems.[50]

Global Crossing recognizes that the Commission has a notice of inquiry open to examine the conduct of state and local governments in the management of their rights of way.[51] Global Crossing urges the Commission to conclude that inquiry and proceed to notice of proposed rulemaking to adopt rules clarifying the boundaries of state and local government authority over management of public rights-of-way, including a prohibition on excessive compensation schemes.

XI. CONCLUSION

Global Crossing strongly supports the Commission's issuance of the *Notice*. It is an important step toward achieving the Commission's goals of streamlining its cable landing licensing process and promoting facilities-based competition in all markets associated with the provision of international telecommunications services. Global

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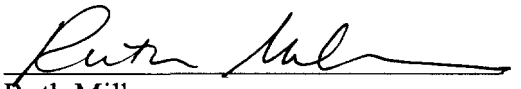
[50] It is also apparent that various agencies in separate jurisdictions are in frequent contact with each other about charges being imposed for landing submarine cables. This is obvious from particular negotiations where an official from one state is clearly aware of negotiations in a second state and the fees that are being discussed. Furthermore, as Global Crossing has previously advised the Commission, it is aware of a joint meeting in June 1999 of an association of Western state lands commissioners to develop a "common approach" to valuing and negotiating rights-of-way. The effect of this coordination among state agencies is to unnaturally suppress competition among states for rights-of-way fees and to ensure that there are no market forces preventing coastal states from fixing an unreasonable and discriminatory price for rights-of-way over state-owned coastal aquatic lands.

[51] *See* Notice of Inquiry, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98.

Crossing offers a number of proposals and recommendations in these comments to help the Commission obtain these vital objectives.

Respectfully submitted,

GLOBAL CROSSING LTD.



Ruth Milkman
Charles W. Logan
Richard D. Mallen
Lawler, Metzger & Milkman, LLC
1909 K Street, NW, Suite 820
Washington, DC 20006
(202) 777-7700

Paul Kouroupas
Senior Counsel
Worldwide Regulatory
and Industry Affairs
Global Crossing Ltd.
Seven Giralda Farms
Madison, NJ 07940
(973) 410-8593

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